

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRYAN DINKEL)	
Claimant)	
VS.)	
)	
MAGELLAN MIDSTREAM PARTNERS, LP)	Docket No. 1,055,826
Respondent)	
AND)	
)	
ZURICH AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requested review of Administrative Law Judge Bruce E. Moore's November 16, 2012 Award. The Board heard oral argument on April 3, 2013. Kelly W. Johnston, of Kechi, Kansas, appeared for the claimant. Brandon A. Lawson, of Kansas City, Missouri, appeared for respondent and its insurance carrier

Judge Moore awarded benefits to the claimant in the amount of \$73,414.50, based upon a 24% impairment of function to the body as a whole for diplopia (double vision), an 8% impairment of function to the body as a whole for residual facial deformity, a 2% impairment of function to the body as a whole for tinnitus, and a 3% impairment of function to the body as a whole for residuals of a facial nerve injury, which combine for a 33% impairment of function to the body as a whole. Additionally, Judge Moore found claimant was not entitled to an interest penalty pursuant to K.S.A. 44-512b, as the nature and extent of claimant's diplopia remained an issue until the Award was written.

RECORD AND STIPULATIONS

The Board has considered the record, as well as the court-ordered reports of John R. W. Taylor, M.D., dated September 7, 2011 and May 3, 2012, and adopted the stipulations listed in the Award. The parties agreed at oral argument that claimant was entitled to future medical treatment. The parties also agreed that the Board may take judicial notice of the *AMA Guides*¹ (hereinafter the *Guides*) and cite the same in our decision.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

ISSUES

Claimant requests that the Board modifies the Award to reflect an additional 10% whole body impairment for permanent left orbit deformity, as well as a 1% permanent partial impairment for his right ring finger. Claimant also argues entitlement to a K.S.A. 44-512b interest penalty for respondent's failure to pay permanent partial disability benefits based on Dr. Taylor's 24% impairment rating for diplopia prior to the Award.

Respondent requests the Board reverse the Award and find Dr. Hufford's rating of 12% impairment is the most accurate reflection of claimant's functional impairment. In the alternative, respondent asserts Judge Moore's Award should be affirmed. Additionally, respondent argues claimant is not entitled to an interest penalty, pursuant to K.S.A. 44-512b, as permanent partial disability benefits were paid prior to Award based on Dr. Hufford's 10% impairment rating, and that all other impairment was in dispute.

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to an interest penalty pursuant to K.S.A. 44-512b?

FINDINGS OF FACT

Claimant has worked for the same business entity since 1980, and for respondent since October 1, 2004, when it took ownership of the business assets. On January 9, 2008, claimant was injured in a motor vehicle accident during the course of his employment. Claimant suffered multiple skull fractures, fractures to his nose and left eye orbit, multiple lacerations, tinnitus in the left ear, and a pulp avulsion of his right ring finger.

Claimant was initially treated at the hospital in Great Bend and then transported to Via Christi Hospital in Wichita. Claimant was seen by Jonathan M. Dort, M.D., who diagnosed claimant with status post motor vehicle collision as a rear unrestrained passenger, left frontal bone fracture, left temporal bone fracture, maxillary sinus fracture, left zygomatic arch fracture and left orbital fracture.

On January 15, 2008, Amy M. Sprole, M.D., performed an open reduction, internal fixation of left orbital roof fracture and left zygomatic tripod fracture, as well as closed reduction of bilateral nasal bone fractures.

Claimant was admitted to Hays Medical Center on September 22, 2008. Claimant complained of entropion, slight pressure in left upper cheek, tinnitus in left ear, and visual difficulties, particularly double vision when looking to the left. Chris W. Regier, D.O., performed open reduction of nasal bone fracture, septoplasty and bilateral submucous resection of inferior turbinates by Chris W. Regier, D.O.

On May 13, 2009, Jerry K. Popham, M.D., performed an anterior orbitotomy for exploration and repair of medial orbital wall fracture with muscle entrapment. The procedure was performed in an effort to address claimant's complaints of diplopia and limitation of ocular motility.

Claimant was seen by David W. Hufford, M.D., on June 30, 2010, at respondent's request. Dr. Hufford is board certified in family practice, as well as certified as an independent medical examiner. Claimant complained of residual dysesthesia across his left frontal, temporal and parietal scalp, tinnitus in the left ear, and frequent diplopia, as well as residual numbness in the tip of his right ring finger. Dr. Hufford provided a 3% whole person impairment for the greater auricular nerve, a 5% whole person impairment for facial deformity, a 1% whole person impairment for tinnitus, and a 1% whole person impairment for visual impairment. Dr. Hufford found no right ring finger impairment. When combining the impairments, Dr. Hufford found claimant has a 10% whole person impairment pursuant to the *Guides*. Dr. Hufford recommended no permanent restrictions.

At some point, Dr. Sprole recommended claimant be seen by Dr. Spinelli, a specialist in treating diplopia, in New York. On July 18, 2011, Judge Moore issued an Order appointing John R. W. Taylor, M.D., an ophthalmologist, to evaluate claimant for purposes of determining whether a referral to Dr. Spinelli was reasonable and necessary.

Dr. Taylor evaluated claimant on September 6, 2011. Dr. Taylor noted the double vision was present when claimant had both eyes open and was not present if he covered or occluded one eye at a time. Additionally, claimant did not complain of seeing double in "straight ahead" vision, nor when he looked to the right. While claimant complained of an injury to his ring finger and subsequent tinnitus, Dr. Taylor did not address these as they were "out of [his] field!" Dr. Taylor diagnosed claimant with restrictive paralytic esotropia (crossed eyes) which is only present when claimant looks to the left. Dr. Taylor opined further surgical management would not be of any benefit and might cause further scarring resulting in additional vision problems.

On November 7, 2011, claimant was seen by Peter V. Bieri, M.D., at the request of his attorney. Dr. Bieri is board certified by the American Academy of Disability Evaluating Physicians. At the time of the visit, claimant complained of persistent left diplopia on lateral gaze, continued dysesthesia from the scalp, slight to moderate nasal obstruction, decreased hearing which is worse on the left, with tinnitus confined to that side, and dysesthesia involving the tip of his right ring finger. Dr. Bieri diagnosed claimant with a closed skull fracture, complex nasal and left orbital fractures, and partial amputation of the tip of the right ring finger. Dr. Bieri provided a 10% whole person impairment for Class II impairment secondary to facial injury, a 4% whole person impairment for unilateral facial weakness, a 2% whole person impairment for tinnitus, and a 1% whole person impairment for dysesthesia of the right ring finger, which combine for a 17% whole person rating pursuant to the *Guides*. Dr. Bieri noted that this rating was "exclusive" of claimant's persistent left diplopia.

Claimant was seen by Joseph B. Sullivan, O.D., an optometrist, on February 13, 2012, at the request of his attorney. At the time of the visit, claimant complained of double vision. Dr. Sullivan found claimant's vision system had been damaged by the accident and his left lateral rectus muscle was not functioning properly. Dr. Sullivan indicated the sunken orbit could be addressed surgically, but more than likely would cause further deterioration of the range of using his eyes together. Dr. Sullivan opined that claimant had reached maximum medical improvement regarding his left lateral rectus muscle and range of binocular vision. Dr. Sullivan noted muscle imbalance was causing diplopia within the central 20° which results in a 100% impairment of ocular motility. Dr. Sullivan provided a 25% impairment of the visual system and a 10% impairment for the sunken left orbit abnormality for a combined 33% impairment of the visual system and a 31% whole person impairment pursuant to the *Guides*. Dr. Sullivan indicated this rating "needs to be combined with Dr. Bieri's whole person impairment."

On April 17, 2012, Judge Moore appointed Dr. Taylor to evaluate claimant and provide an impairment rating pursuant to the *Guides*.

Claimant saw Dr. Taylor on May 1, 2012. In his May 3, 2012 report, Dr. Taylor found claimant had no impairment for visual acuity loss or visual field loss, but that his visual impairment was caused by diplopia. Dr. Taylor noted claimant had significant diplopia well within the central 20° of vision, which resulted in 100% impairment of ocular motility. Based on this, Dr. Taylor provided a 25% impairment for diplopia, which results in a 24% whole person impairment pursuant to the *Guides*.

At the August 2, 2012 regular hearing, claimant complained of double vision, left ear tinnitus, sinus problems, numbness from the top of the head on his left side down to the jaw line, and pain every day on the left side of his face. Claimant testified that he returned to work on March 7, 2008, and has continued to work for respondent earning comparable wage. Claimant acknowledged he is capable of doing the same things he did before the accident and his vision problems have not affected his ability to obtain a driver's license.

Dr. Sullivan's deposition was taken on August 23, 2012. When questioned regarding his rating for the sunken left orbit abnormality, Dr. Sullivan testified as follows:

- Q. . . . Was there another element of your rating that went into the 31 percent figure that's reported on Exhibit 2?
- A. Yes. There is another section in another part in section – in Chapter 8. It goes on back to other areas.
- Q. All right. So is this the fourth or kind of miscellaneous category you referred to earlier?
- A. That is correct.

- Q. Very well. Please tell us again referring to Exhibit 4 how you evaluated that aspect of the visual impairment.
- A. In Chapter 8 section – okay, in Chapter 8 page 222 there is section 8.5 which is called other conditions.
- Q. Is this the last page of the exhibit, doctor?
- A. It is the last page of Chapter 8.
- Q. Very well. And then how did you use the information in section 8.5 of page 222 in this analysis?
- A. What that says is up to an additional 10 percent impairment may be combined with the whole person impairment related to the visual systems for such conditions as permanent deformation of the orbit which is what has happened in this case. The orbit has been broken and his eye has sunken back in.
- Q. Very well, Doctor. So you have deemed it appropriate to add the additional 10 percent described in section 8.5.
- A. That is correct.²

Dr. Sullivan further testified on cross examination as follows:

- Q. ... With respect to that 10 percent you added for the sunken left orbit abnormality, what is your reasoning for providing the 10 percent for that abnormality, what justified that in your mind?
- A. There is an obvious difference in facial appearance of the one side where the injury occurred. And so, therefore, that eye is sunken back in and actually we have a permanent deformity to the orbit. And part of that is contributing to his facial appearance.
- Q. And in your opinion does that deformity in any way actually impair vision or is it just simply the disfigurement?
- A. It actually is involved in the impairment of vision.
- Q. How so?
- A. Because one eye is on a different plane than the other. And so there is a difference in focusing of one eye compared with the other eye.

² Sullivan Depo. at 17-19.

- Q. Is that going to affect then acuity? Is that what that would affect or what part of the vision --
- A. It affects the size, the image size of the two objects, and his ability to put the image from one eye to go with the image of the other eye.
- Q. Okay, then so to me that sounds like what you are saying is that the actual acuity of the vision, you are not going to be able to see as well literally because of that condition.
- A. It's not seeing as well. It is the image size is going to be different from one eye than the other.
- Q. So what does that do then in terms of the vision -- the literal vision that [claimant] has? Is that blurrier or -- you said one can be bigger than the other. Is that in blurriness or how is that manifest --
- A. It is blurrier because there are two images that are superimposed upon one another and one image [sic] is slightly larger than the other image.³

Dr. Hufford testified on on September 12, 2012. He admitted misapplying a table when arriving at claimant's diplopia impairment. He modified his rating as follows:

... I have to admit, as I reviewed for this deposition, in reviewing my use of Table 7 on Page 219, I may have misapplied that table in doing so; and on second consideration, as I reviewed, I believe [claimant] probably should have a 3 percent whole person impairment from that table rather than 1 percent. . . . However, that would alter his overall permanent partial impairment to 12 percent rather than 10 percent to the whole person.⁴

PRINCIPLES OF LAW

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

³ *Id.* at 21-23.

⁴ Hufford Depo. at 12.

K.S.A. 44-512b states in part:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

(b) Interest assessed pursuant to this section shall be considered a penalty and shall not be considered a loss or a loss adjustment expense by an insurance carrier in the promulgation of rates for workers compensation insurance.

ANALYSIS

Nature and Extent of Disability

It appears that Judge Moore:

- adopted the 24% whole body rating from both Dr. Taylor and Dr. Sullivan for diplopia;
- added together Dr. Bieri's 10% whole body rating for facial deformities with Dr. Hufford's 5% whole body rating for a left orbit deformity, and rounded-up to get an 8% whole body rating;
- granted claimant a 3% whole body rating for facial nerve impairment based on Dr. Hufford's opinion, in lieu of Dr. Bieri's 4% whole body rating;
- awarded claimant a 2% whole body rating for tinnitus based on Dr. Bieri's opinion, instead of utilizing Dr. Hufford's 1% whole body rating; and
- found claimant had a 0% whole body impairment to his right ring finger based on Dr. Hufford's 0% rating, instead of Dr. Bieri's 1% rating.

These ratings combine to be a 33% whole body impairment. The Board does not have any concerns regarding Judge Moore's analysis of the medical evidence and the 33% whole body impairment he awarded claimant.

The parties dispute the additional 10% whole body impairment Dr. Sullivan assigned to claimant under section 8.5 of the *Guides*, which states on page 222:

Up to an additional 10% impairment may be *combined* with the whole-person impairment related to the visual system for such conditions as permanent deformities of the orbit, scars, and other cosmetic deformities that do not otherwise alter ocular function.

Page 209 of the *Guides* states:

Permanent deformities of the orbit, such as scars or cosmetic defects that do not alter ocular function, also may be considered to be factors causing whole-person impairments as high as 10%. If facial disfigurement due to scarring above the upper lip is evaluated by means of the chapter in the *Guides* on the ear, nose, throat, and related structures, then any overlapping impairment percentage due to ocular scarring should be subtracted from the greater value.

Dr. Sullivan testified that he assigned a 10% impairment under section 8.5 for two reasons: (1) claimant had an obvious difference in facial appearance and (2) the orbit deformity caused a difference in focusing and blurred vision, because the left eye is set back further than the right eye.⁵ Dr. Sullivan testified that section 8.5 does not only concern disfigurement or impaired appearance.⁶ The Board views section 8.5 as only concerning cosmetic deformities that do not impact vision. Section 8.5 concerns deformities that are also addressed in Chapter 9 of the *Guides*. Both Drs. Bieri and Hufford rated claimant's facial deformities based on page 229 of Chapter 9 in the *Guides*. Dr. Sullivan's rating for facial deformities appears to be redundant to the ratings provided by Drs. Bieri and Hufford.

Dr. Sullivan also testified that the other sections of the *Guides* addressing visual impairment do not address blurred vision.⁷ The additional 10% impairment rating assessed by Dr. Sullivan for blurred vision is not strictly supported, or *not* supported, by the *Guides*. A physician may use his judgment to address impairments not addressed by the *Guides*.⁸ However, claimant did not prove that he has blurred vision. He did not testify to having blurred vision and the reports of other medical experts, including the court-ordered expert, Dr. Taylor, fail to mention claimant having blurry vision.

⁵ Sullivan Depo. at 21-23.

⁶ *Id.* at 24.

⁷ *Id.* at 23.

⁸ K.S.A. 44-510e(a); See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 202 P.3d 108 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010, and *Kinser v. Topeka Tree Care, Inc.*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 1, 2006).

Claimant, citing *Anderson*,⁹ argues Dr. Sullivan's rating for blurred vision is uncontradicted and, absent some showing of being untrustworthy, must be adopted. The Board views Dr. Taylor's court-ordered rating, which excludes a rating for or even mention of blurred vision, as contrary to Dr. Sullivan's inclusion of a rating for such condition.

K.S.A. 44-512b Interest Penalty

Claimant demanded payment of interest based on respondent's failure to pay the value of Dr. Taylor's opinion that claimant had a 24% whole body impairment rating for diplopia. Previously, respondent had paid the value of Dr. Hufford's 10% whole body impairment rating, which included a 1% whole body rating for diplopia. As noted above, Dr. Hufford amended his rating for diplopia from 1% to 3% to the body as a whole, and his 10% rating to 12% to the body as a whole, at his deposition.

The Board agrees with Judge Moore that a legitimate, non-frivolous dispute existed regarding the nature and extent of claimant's disability. While administrative law judges frequently adopt the impairment rating provided by the court-ordered physician, Judge Moore was not required to adopt Dr. Taylor's rating. The Board adopts Judge Moore's conclusions on this issue. The Board does not find that respondent's failure to pay prior to Judge Moore's Award was without just cause or excuse. Claimant's request for interest pursuant to K.S.A. 44-512b is denied.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of Judge Moore should be affirmed. As agreed by the parties, claimant is also entitled to future medical treatment upon proper application to the Director of Workers Compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. More dated November 16, 2012, is affirmed. Claimant is entitled to future medical treatment upon proper application.

⁹ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

BOARD MEMBER

BOARD MEMBER

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Honorable Bruce E. Moore